

**EXHIBIT D**

**Special Terms and Conditions**

**1. CONTRACT MANAGEMENT**

- A. The Contractor's Project Manager is responsible for the day-to-day project status, decisions, and communications with the Energy Commission's Contract Manager. The Contractor may change its Project Manager by giving written notice to the Energy Commission, but the Energy Commission reserves the right to approve any substitution of the Project Manager.
- B. The Energy Commission may change its Contract Manager at any time by giving written notice to the Contractor. The Energy Commission's Contract Officer will sign the written notice.
- C. Energy Commission staff may work side by side with the Contractor's staff, to the extent and under conditions that may be directed by the Energy Commission's Contract Manager. In this connection, the Energy Commission staff will be given access to all data, working papers, etc., that the Contractor may seek to utilize.
- D. The Contractor will not be permitted to utilize Energy Commission personnel for the performance of services that are the Contractor's responsibility, unless the Energy Commission's Contract Manager agrees to such utilization in writing and an appropriate adjustment in price is made. No charge will be made to the Contractor for the services of Energy Commission employees while performing, coordinating or monitoring functions.

**2. STANDARD OF PERFORMANCE**

The Contractor shall be responsible in the performance of it and its subcontractor's work under this Agreement for exercising the degree of skill and care required by customarily accepted good professional practices and procedures. Any costs for failure to meet these standards, or otherwise defective services, which require reperformance, as directed by the Contract Manager or its designee, shall be borne in total by the Contractor/subcontractor and not the Energy Commission. In the event the Contractor/subcontractor fails to perform in accordance with the above standard, the following will apply. Nothing contained in this section is intended to limit any of the rights or remedies that the Energy Commission may have under law.

- A. The Contractor/ subcontractor will reperform, at its own expense, any task that was not performed to the reasonable satisfaction of the Contract Manager. Any work reperformed pursuant to this section shall be completed within the time limitations originally set forth for the specific task involved. The Contractor/subcontractor shall work any overtime required to meet the deadline for the task at no additional cost to the Energy Commission.

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- B. The Energy Commission shall provide a new schedule for the reperformance of any task pursuant to this section in the event that reperformance of a task within the original time limitations is not feasible.
- C. If the Energy Commission directs the Contractor not to reperform a task, the Contract Manager and Contractor shall negotiate a reasonable settlement for satisfactory services rendered. No previous payment shall be considered a waiver of the Energy Commission's right to reimbursement.

### 3. **SUBCONTRACTS**

The Contractor shall enter into agreements with the following firms and/or individuals, and shall manage their performance.

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**OR**

No subcontractors are named for this Agreement. If subcontractors are needed to perform any portion of this Agreement, the following criteria must be met and the Contractor shall manage their performance.

**AND**

- A. Nothing contained in this Agreement or otherwise, shall create any contractual relationship between the Energy Commission and any subcontractors, and no subcontract shall relieve the Contractor of its responsibilities and obligations under this Agreement. The Contractor agrees to be as fully responsible to the Energy Commission for the acts and omissions of its subcontractors and/or persons either directly or indirectly employed by any of them as it is for the acts and omissions of persons directly employed by the Contractor. The Contractor's obligation to pay its subcontractors is an independent obligation from the Energy Commission's obligation to make payments to the Contractor. As a result, the Energy Commission shall have no obligation to pay or to enforce the payment of any monies to any subcontractor.
- B. The Contractor shall be responsible for establishing and maintaining contractual agreements with and the reimbursement of each of the subcontractors for work performed in accordance with the terms of this Agreement. The Contractor shall be responsible for: (1) scheduling and assigning subcontractors to specific tasks in the manner described in this Agreement; (2) coordinating subcontractor accessibility to Energy Commission staff; and (3) submitting completed products to the Contract Manager.

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### C. Required Subcontract Provisions

All subcontracts shall contain the following:

- 1) The provisions of Exhibit E, including attachments.
- 2) The "Recordkeeping and Inspection of Records" section of this Exhibit (Section 5).
- 3) A provision that further assignments shall not be made to any third or subsequent tier subcontractor without additional written consent of the Contract Manager.
- 4) The confidentiality provisions in the "Reports" section of this Exhibit (Section 7).
- 5) The audit rights, indemnification, and non-discrimination provisions stated in the General Terms and Conditions (Exhibit C);
- 6) Provisions recognizing the applicability of the funding limitations of 10 CFR Section 420.18, as modified by Section 9.7 of Exhibit 1 of the U.S. Department of Energy Funding Opportunity Announcement DE-FOA-0000052.

### D. Assignment of Subcontracts

The Contractor shall not allow any subcontractors to assign any portion of a subcontract related to this Agreement to a third party or subsequent tier subcontractors without first obtaining the written consent of the Contract Manager and following the procedures below in the "Process for Additions, Removal or Substitutions of Subcontractors" subsection of this section.

### E. Bureau of Energy Commission Audits

All subcontracts entered into pursuant to this Agreement shall be subject to examination and audit by the Bureau of Energy Commission Audits for a period of three (3) years after final payment under the Agreement.

### F. Notification of Subcontract Termination

Upon the termination of any subcontract, the Contractor shall notify the Contract Manager and Contract Officer immediately in writing.

### G. Process for Offering Work; Process for Adding or Substituting People Listed in the Agreement

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If the Energy Commission or Contractor requires the replacement or substitution of a person listed in the Agreement to provide a particular service, or requires that a new person is added, the Contractor shall:

- 1) First offer the work to qualified persons already listed in this Agreement (either an employee of the Contractor or a subcontractor).
- 2) If there is no available person listed in this Agreement who can perform the work, then the Contractor shall provide documentation from all the persons who were offered and declined the work to the Contract Manager. Then, the Contractor may request to add a new person to the Agreement. A person added to the Agreement is thereafter treated as a person listed in this Agreement and can be offered future work without first offering it to originally listed people.
- 3) If the person added is an employee of the Contractor or an existing subcontractor, the Contractor shall provide the added employee's pay rate, classification and resume to the Contract Manager, and the Contract Manager may approve the new person and rate. The Contract Manager approval is only valid if made in writing. In addition, any added person must fit within a classification and corresponding rate already listed in the Agreement. Adding classifications and/or higher rates requires a formal amendment and cannot be accomplished through this process.
- 4) If the person to be replaced or substituted was identified in the Agreement as a Disabled Veteran Business Enterprise (DVBE) firm, refer to the "Disabled Veteran Business Enterprise (DVBE) Requirements" section below for changes to DVBEs.
- 5) If the person added is a new subcontractor, the Contractor shall use the process outlined below.

### H. Process for Additions, Removal or Substitutions of Subcontractors

The Energy Commission reserves the right to replace a subcontractor, request additional subcontractors, and approve additional subcontractors requested by the Contractor. Such changes shall be subject to the following conditions:

- 1) If the Energy Commission or Contractor requires the replacement, substitution or addition of a subcontractor, the subcontractor shall be selected using either: (a) A competitive bid process with written evaluation criteria by obtaining three (3) or more bids and advertising the work to a suitable pool of subcontractors including without limitation: California Contracts Register; the Contractor's mailing lists; mass media; professional papers or journals; posting on websites; and telephone or email solicitations; or (b) Non-competitive bid (sole source) process with a specific subcontractor.

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- 2) The Contractor may also need to comply with Disabled Veteran Business Enterprise requirements for the proposed subcontractors.
- 3) When a subcontractor is proposed to be added, under either a competitive or non-competitive process, the Contract Manager shall complete and submit to the Contracts Officer a "Subcontractor Add" form. This form identifies the new subcontractor, resumes, what bidding method was used to obtain the subcontractor (competitive or non-competitive), and rates. The proposed subcontract can be executed only after the Contract Officer approves the "Subcontractor Add" form.

### I. Separation of Duties from Monitoring, Verification, and Evaluation Contractor

The Energy Commission has retained KEMA Inc. to serve as the monitoring, verification, and evaluation (MV&E) contractor for all of the Energy Commission's ARRA-funded projects, including projects funded through contracts, grants, or loans under the State Energy Program, the Energy Efficiency and Conservation Block Grant Program, the State Energy Efficient Appliance Rebate Program, and the Energy Assurance Planning Program. In order to achieve the Energy Commission's policy requiring separation of duties between the MV&E contractor and any projects that it evaluates, the Contractor is prohibited from including KEMA Inc. or its subsidiary known as KEMA Services Inc. as a participant in this project, where KEMA Inc. or KEMA Services Inc. are paid either from funds of this Agreement as a subcontractor or from other funds the Contractor has included as cost share to achieve the objectives of this Agreement.

## 4. WORK AUTHORIZATIONS

### A. Process

- 1) The Contract Manager, in conjunction with the Contractor, shall prepare Work Authorizations (WA) directing the work the Contractor will provide using the format provided by the Contract Manager.
- 2) The WA shall be approved by the authorized individuals of the Contractor and the Energy Commission using the Energy Commission's internal review process. The WA shall be signed by the Contractor's authorized individual and by the Energy Commission's Contract Manager. The Contract Manager shall sign last. In addition to the Contract Manager, the WA may be signed by Energy Commission staff serving as Project Manager for the individual WA.
- 3) The WA becomes effective when the Contract Manager signs it. No work shall begin until the WA is approved and signed by both parties.

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- 4) The Contract Manager shall file each signed WA with the Energy Commission's Contracts Officer before payment is approved for the WA.

### B. Content of WA

Each WA shall include:

- 1) Contract Number
- 2) WA Number
- 3) WA Title
- 4) Effective Date (date signed by both the Contractor and Contract Manger indicating the Contractor may begin work)
- 5) End Date
- 6) Funding Source
- 7) Objective or goal of the WA
- 8) Detailed scope of work and tasks
- 9) Task the WA falls within in the Contract
- 10) Schedule/Due dates and Deliverables
- 11) Contact Information
- 12) Contractor and Subcontractor personnel that will perform the work
- 13) Identification of DVBE
- 14) Detailed Budget
  - a) Hours and fully loaded hourly rates by person or job classification, as allowed by the Contract budget
  - b) Travel and per diem, as allowed by the Contract budget
  - c) Other direct costs, as allowed by the Contract budget (i.e. postage)
- 15) Other items as required by the Contract Manager

### C. Amendments

- 1) An amendment is required for the following changes, including but not limited to:
  - a) Changes to the scope of work (i.e. new or changed work)
  - b) Adding funds
  - c) Extending the term
  - d) Change in budget line item/category over 10% of the total WA budget, or greater than \$75,000.00
- 2) Amendments shall be approved and signed using the same process as the original WA.
- 3) Amendments must be made prior to the termination date of the original WA or as amended.

### D. Changes without Amendment

The Contract Manager may make the following changes to the WA without an amendment upon written notification to the Contractor:

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- 1) Changes to deliverable due dates, as long as the due dates do not go beyond the end term of the WA.
- 2) Minor scope of work changes that only correct grammatical errors or reference mistakes.
- 3) Changes to add or replace persons providing service as directed by Contract Manager. The process for adding, replacing or substituting persons providing service on a WA is included in the "Subcontracts" section above.
- 4) Change in budget line items or tasks up to 10% of the total WA dollar amount or less than \$75,000.00.

### E. Stop Work

The Energy Commission reserves the right to require the Contractor to stop or suspend work on any WA. The Contract Manager, in consultation with the Contracts Officer, shall provide notice in writing to the Contractor of the date work is stopped or suspended. Costs incurred up to that date shall be reimbursed in accordance with the termination clause.

### F. Termination of WA

The Contract Manager may terminate the WA without cause with thirty (30) days written notice to the Contractor.

### G. Incorporated into Agreement

Each WA shall be incorporated into this Agreement. However, it is understood and agreed by both parties that all of the terms and conditions of this Agreement shall remain in force with the inclusion of any such WA. A WA shall in no way constitute an independent Agreement, nor in any way amend or supersede any of the other provisions of this Agreement.

### H. Payment

Payment for services is based upon an approved budget in each WA. Any costs or expenses incurred by the Contractor or any subcontractor that have not been identified in the WA shall be borne by the Contractor.

### I. Costs

The actual cost of an approved, completed WA shall not exceed the authorized amount of the WA budget. If, in the performance of the WA, the Contractor or Contract Manager determines that the total cost might exceed the WA budget



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amount, the Contractor or Contract Manager shall immediately notify the other. Upon such notification, the Contract Manager may:

- 1) Amend the WA scope of work to accomplish the work within the budget;
- 2) Amend the WA to augment the budget;
- 3) Direct the Contractor to complete the work for the budgeted amount without changes to the scope of work; or
- 4) Terminate the WA.

### 5. **DISABLED VETERAN BUSINESS ENTERPRISE (DVBE) REQUIREMENTS**

#### A. Reporting

If the Contractor made a commitment to achieve DVBE participation for this Agreement, the Contractor must within sixty (60) days of receiving final payment under this Agreement, certify in a report to the Contract Officer: (1) the total amount the Contractor received under this Agreement; (2) the name and address of the DVBE(s) that participated in the performance of the Agreement; (3) the amount each DVBE received from the Contractor; (4) that all payments under the Agreement have been made to the DVBE(s); and (5) the actual percentage of DVBE participation that was achieved. Pursuant to California Military and Veterans Code Section 999.5(d), a person or entity that knowingly provides false information shall be subject to a civil penalty for each violation.

#### B. Substitution of DVBE

The Contractor shall use each DVBE identified in its proposal or listed in this Agreement. The Contractor understands and agrees that if DVBEs were identified in its proposal or listed in this Agreement, award of this Agreement is based in part on its commitment to use the DVBE subcontractor(s). If the Contractor believes an identified DVBE must be replaced or substituted, the Contractor shall inform the Contract Manager and Contract Officer in writing of the reason for the DVBE replacement. Pursuant to California Military and Veterans Code Section 999.5 (e), a DVBE subcontractor may only be replaced by another DVBE subcontractor and must be approved by the Department of General Services. The Contractor shall complete revised DVBE certification forms (provided by the Contract Officer) identifying the new DVBE.

#### C. Amendment

This Agreement shall be amended if: a DVBE must be substituted and DGS has given approval; or there are changes to the scope of work that impact the DVBE subcontractor(s) identified in the proposal or listed in this Agreement.



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### D. Grounds for Termination; Damages; Penalties

Failure of the Contractor to seek substitution and adhere to the DVBE participation level identified in the proposal or listed in this Agreement may be cause for: (1) termination of this Agreement; (2) recovery of damages under rights and remedies due to the State; and (3) penalties as outlined in California Military and Veterans Code Section 999.9 and California Public Contract Code Section 10115.10.

## 6. **RECORDKEEPING AND INSPECTION OF RECORDS**

The Contractor shall retain backup source documentation for audit purposes, and make the documentation available to the Energy Commission and the Federal government upon request. In accordance with 10 CFR Part 600, the Contractor's accounting records must be supported by documentation that includes but is not limited to cancelled checks, paid bills, payrolls, time and attendance records, and contract and subgrant award documents. Pursuant to 10 CFR Section 600.242, the Contractor agrees to maintain records that directly pertain to, and involve transactions relating to, this Agreement for possible audit for a minimum of three (3) years after final payment, unless a longer period of records retention is stipulated. The Contractor shall include appropriate provisions in each of its subcontracts to secure adequate backup documentation to verify all subcontractor services and expenses invoiced for payment under this Agreement.

In accordance with Sections 902, 1514 and 1515 of the American Recovery and Reinvestment Act of 2009 (ARRA), the Contractor agrees that it shall permit the State of California, the United States Comptroller General or his representative, or the appropriate Inspector General appointed under Section 3 or 8G of the United States Inspector General Act of 1978 or his representative to: (1) examine any records that directly pertain to, and involve transactions relating to, this Agreement; and (2) interview any officer or employee of the Contractor or any of its subcontractors regarding the activities funded with funds appropriated or otherwise made available by ARRA. The Contractor shall include this provision in all of its agreements with its subcontractors from whom it acquires goods or services in its execution of ARRA-funded work.

## 7. **PERFORMANCE EVALUATION**

Consistent with California Public Contract Code Sections 10367 through 10371, the Energy Commission shall, upon completion of this Agreement, prepare a performance evaluation of the Contractor. Upon filing an unsatisfactory evaluation with the Department of General Services, Office of Legal Services (DGS) the Energy Commission shall notify and send a copy of the evaluation to the Contractor within fifteen (15) days. The Contractor shall have thirty (30) days to prepare and send statements to the Energy Commission and DGS defending its performance. The Contractor's statement shall be filed with the evaluation in the Energy Commission's

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Contract file and with DGS for a period of thirty-six (36) months and shall not be a public record.

### 8. **REPORTS**

A. **Federal Reporting Requirements:** The Contractor shall submit progress reports to the Energy Commission in accordance with Exhibits A and E.

B. **Additional Reporting Requirements:**

- 1) **Progress and Final Reports:** The Contractor shall prepare progress reports summarizing all activities conducted by the Contractor to date on a schedule as provided in Exhibit A. At the conclusion of this Agreement, the Contractor shall prepare a comprehensive Final Report, on a schedule as provided in Exhibit A.
- 2) **Title:** The Contractor's name shall only appear on the cover and title page of reports as follows:  
  
California Energy Commission  
Project Title  
Contractor Number  
By (Contractor)
- 3) **Ownership:** Each report shall become the property of the Energy Commission.
- 4) **Non-disclosure:** The Contractor will not disclose data or disseminate the contents of the final or any progress report without written permission of the Contract Manager, except as provided in 6, below. Permission to disclose information on one occasion or at public hearings held by the Energy Commission relating to the same shall not authorize the Contractor to further disclose and disseminate the information on any other occasion. The Contractor will not comment publicly to the press or any other media regarding its report, or the Commission's actions on the same, except to Commission staff, the Contractor's own personnel involved in the performance of this Contract, or at a public hearing, or in response to questions from a legislative committee. Notwithstanding the foregoing, in the event any public statement is made by the Energy Commission or any other party, based on information received from the Energy Commission as to the role of the Contractor or the content of any preliminary or final report, the Contractor may, if it believes the statement to be incorrect, state publicly what it believes is correct.
- 5) **Confidentiality:** Neither the Contractor, its employees, or any tier of subcontractors may disclose any record that has been designated as

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confidential or is the subject of a pending application of confidentiality, except as provided in 20 California Code of Regulations (CCR), Sections 2506 and 2507, unless disclosure is ordered by a court of competent jurisdiction (20 CCR Sections 2501, et seq.). At the election of the Contract Manager, the Contractor, the Contractor's employees, and any subcontractor shall execute a "Confidentiality Agreement," supplied by the Contract Manager or Contract Officer. Each subcontract shall contain provisions similar to the foregoing related to the confidentiality and nondisclosure of data.

- 6) **Disclosure:** Ninety (90) days after any document submitted by the Contractor is deemed by the Contract Manager to be a part of the public records of the State, the Contractor may, if it wishes to do so at its own expense, publish or utilize a report or written document but shall include the following acknowledgement and disclaimer:

"This material is based upon work supported by the California Energy Commission and the U.S. Department of Energy under Award Number(s) DE-0000221."

*Disclaimer:* "This report was prepared as an account of work sponsored by an agency of the United States Government. Neither the California Energy Commission, the United States Government, nor any agency thereof, nor any employees, makes any warranty, express or implied, or assumes any legal liability or responsibility for the accuracy, completeness, or usefulness of any information, apparatus, product, or process disclosed, or represents that its use would not infringe privately owned rights. Reference herein to any specific commercial product, process, or service by trade name, trademark, manufacturer, or otherwise does not necessarily constitute or imply its endorsement, recommendation, or favoring by the California Energy Commission, the United States Government, or any agency thereof. The views and opinions of authors expressed herein do not necessarily state or reflect those of the California Energy Commission, the United States Government, or any agency thereof."

### 9. **PURCHASE OF EQUIPMENT**

- A. Equipment identified in this Agreement is approved for purchase.
- B. Equipment not identified in this Agreement shall be subject to prior written approval from the Contract Manager.
- C. All equipment purchased with Federal funds shall be subject to the provisions of Title 10 CFR Part 600.

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D. All equipment purchased with Energy Commission funds shall be subject to the following terms and conditions:

- 1) Title to all non-expendable equipment purchased in whole or in part or ~~in whole~~ with Energy Commission funds shall remain with the Commission. Non-expendable equipment is defined in accordance with Section 7.29 of the State Contract Manual as items of equipment that have a normal life expectancy of one year or more and an approximate unit price of \$5,000 or more.
- 2) The Contractor shall maintain an inventory record of each piece of non-expendable equipment purchased or built with Energy Commission funds. The inventory record shall include the date the equipment was acquired, total cost, serial number, model identification, and any other information or description necessary to identify the equipment.
- 2)3) The Contractor shall assume all risk for maintenance, repair, destruction and damage to the equipment while it is in the Contractor's possession or subject to its control. The Contractor is not expected to repair or replace equipment that is intended to undergo significant modification or testing to the point of damage / or destruction as part of the work described in Exhibit A, Scope of Work.

E. Upon termination or completion of this Agreement, the Energy Commission's Executive Director may:

- 1) Authorize the continued use of such equipment.
- 2) By mutual agreement with the Contractor, allow the Contractor to purchase equipment for an amount not to exceed the residual value of the equipment as of the date of termination or completion of this Agreement.
- 3) Request delivery of the equipment to the Energy Commission, with any costs incurred for such return to be borne by the Energy Commission.

## 10. **INTELLECTUAL PROPERTY RIGHTS OF PARTIES**

If intellectual property will be used or developed under this Agreement, the following provisions apply.

A. Exhibit E, Attachment 5 contains the intellectual property rights between the Energy Commission and the U.S. Department of Energy (DOE), which has funded this Agreement.

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- B. The Contractor shall obtain the same rights for the Energy Commission and DOE from all subcontractors, and others who produce copyrightable material, data, works of art, works of fine art or subject inventions under this Agreement. The Contractor shall incorporate these paragraphs, modified appropriately, into its agreements with subcontractors. No subcontract shall be entered into without these rights being assured to the Energy Commission and DOE from the subcontractor.
- C. Rights to DOE
- 1) The Contractor grants to DOE for all copyrightable work a royalty-free, nonexclusive and irrevocable right to reproduce, publish or otherwise use the work for Federal purposes, and to authorize others to do so.
  - 2) The Contractor acknowledges and agrees that DOE has the right to:
    - (a) Obtain, reproduce, publish or otherwise use the data first produced under the Agreement; and
    - (b) Authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.
- D. Rights to Energy Commission
- 1) The Contractor grants to the Energy Commission for all copyrightable material, work of art and original work of authorship first produced, composed or authored in the performance of this Agreement a royalty-free, paid-up, non-exclusive, irrevocable, nontransferable, worldwide license to produce, translate, publish, use, dispose of, reproduce, prepare derivative works based on, distribute copies of, publicly perform, or publicly display a work of art or fine art, and to authorize others to produce, translate, publish, use, dispose of, reproduce, prepare derivative works based on, distribute copies of, publicly perform, or publicly display a work of art or fine art.
  - 2) The Contractor grants to the Energy Commission a no-cost, nonexclusive, nontransferable, irrevocable license to use or have practiced for or on behalf of the State of California for governmental purposes any subject invention(s) first produced in the performance of this Agreement.
  - 3) The Contractor grants to the Energy Commission the no-cost use of any technical data first produced or specifically used in the performance of this Agreement.
- E. "Data" as used in this Agreement means recorded information, regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research or experimental, developmental or engineering work, or be usable or be used to define a design or process, or to support a premise or conclusion asserted in any deliverable document required by this Agreement.

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- The data may be graphic or pictorial delineations in media, such as drawings or photographs, data or information, etc. It may be in machine form, such as punched cards, magnetic tape or computer printouts, or may be retained in computer memory.
- F. "Deliverable data" is that data which, under the terms of this Agreement, is required to be delivered to the Energy Commission and shall belong to the Energy Commission.
- G. "Proprietary data" is such data as the Contractor has identified in a satisfactory manner as being under the Contractor's control prior to commencement of performance of this Agreement, and which the Contractor has reasonably demonstrated as being of a proprietary nature either by reason of copyright, patent or trade secret doctrines in full force and effect at the time when performance of this Contract is commenced. The title to "proprietary data" shall remain with the Contractor throughout the term of this Agreement and thereafter. The extent of the Energy Commission access to, and the testimony available regarding, the proprietary data shall be limited to that reasonably necessary to demonstrate, in a scientific manner to the satisfaction of scientific persons, the validity of any premise, postulate or conclusion referred to or expressed in any deliverable for this Agreement.
- H. "Generated data" is that data, which a Contractor has collected, collated, recorded, deduced, read out or postulated for utilization in the performance of this Agreement. Any electronic data processing program, model or software system developed or substantially modified by the Contractor in the performance of this Agreement at the Energy Commission's expense, together with complete documentation thereof, shall be treated in the same manner as "generated data." "Generated data" shall be the property of the Energy Commission, unless and only to the extent that it is specifically provided otherwise in this Agreement.
- I. As to "generated data" which is reserved to the Contractor by the express terms hereof, and as to any pre-existing or "proprietary data" which has been utilized to support any premise, postulate or conclusion referred to or expressed in any deliverable hereunder, the Contractor shall preserve the same in a form which may be introduced as evidence in a court of law at the Contractor's own expense for a period of not less than three (3) years after receipt by the Energy Commission of the Final Report herein.
- J. Before the expiration of the three (3) years, and before changing the form of or destroying any data, the Contractor shall notify the Energy Commission of any contemplated action and the Energy Commission may, within thirty (30) days after notification, determine whether it desires the data to be preserved. If the Energy Commission so elects, the expense of further preserving data shall be paid for by the Energy Commission. The Contractor agrees that the Energy Commission may at its own expense, have reasonable access to data throughout

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the time during which data is preserved. The Contractor agrees to use its best efforts to furnish competent witnesses or to identify competent witnesses to testify in any court of law regarding data.

K. The Contractor agrees that it shall not use or allow subcontractors or other third parties to use any deliverable or generated data owned by the Energy Commission and in the possession or control of the Contractor, subcontractor, or third party after termination of this Agreement. Neither the Contractor, subcontractors, nor other third parties have a license to use the data after termination of this Agreement. The Contractor, subcontractor, and other third parties may use the data to the same extent as other members of the public if the Energy Commission makes the data publicly available after termination of this Agreement.

L. The Contractor agrees that it shall return all deliverable and generated data owned by the Energy Commission to the Commission within thirty (30) days of termination of this Agreement, including any backup copies of the data. The Contractor shall destroy the data if its return is infeasible. "Destroy" means to physically or electronically eliminate or ruin the data beyond all possible recovery.

Destruction of the data is subject to the Energy Commission's approval. The Contractor must provide the Contract Manager written notice of its intent to destroy any deliverable or generated data owned by the Energy Commission within fifteen (15) days of termination of this Agreement. The notice of intent must identify the data and specify the reason that its return is infeasible. The Contract Manager will notify the Contractor of the Energy Commission's decision regarding destruction of the data within thirty (30) days of receipt of the notice of intent. The Contractor shall provide the Contract Manager with a written certification of destruction within five (5) days of destruction of the data.

The Contractor agrees to indemnify the Energy Commission in the event of breach of its agreement not to use the data and to destroy data for which return is infeasible.

### 11. **PUBLIC HEARINGS**

If public hearings on the scope of work are held during the period of this Agreement, the Contractor will make available to testify the personnel assigned to this Agreement. The Energy Commission will reimburse the Contractor for compensation and travel of the personnel at the Agreement rates for the testimony that the Energy Commission requests.



**12. DISPUTES**

In the event of a Contract dispute or grievance between the Contractor and the Energy Commission, both parties shall follow the following procedure. The Contractor shall continue with the responsibilities under this Agreement during any dispute.

**A. Commission Dispute Resolution**

The Contractor shall first discuss the problem informally with the Contract Manager. If the problem cannot be resolved at this stage, the Contractor must direct the grievance together with any evidence, in writing, to the Contracts Officer. The grievance must state the issues in the dispute, the legal authority or other basis for the Contractor's position, and the remedy sought. The Contracts Officer and the Program Office Manager must make a determination on the problem within ten (10) working days after receipt of the written communication from the Contractor. The Contracts Officer shall respond in writing to the Contractor, indicating a decision and explanation for the decision. Should the Contractor disagree with the Contracts Officer's decision, the Contractor may appeal to the Executive Director.

The Contractor must prepare a letter indicating why the Contracts Officer's decision is unacceptable, attaching to it the Contractor's original statement of the dispute with supporting documents, along with a copy of the Contracts Officer's response. This letter shall be sent to the Energy Commission's Executive Director within ten (10) working days from receipt of the Contracts Officer's decision. The Executive Director or designee shall meet with the Contractor to review the issues raised. A written decision signed by the Executive Director or designee shall be returned to the Contractor within twenty (20) working days of receipt of the Contractor's letter. The Executive Director may inform the Energy Commission of the decision at an Energy Commission business meeting. Should the Contractor disagree with the Executive Director's decision, the Contractor may appeal to the Energy Commission at a regularly scheduled business meeting. The Contractor will be provided with the current procedures for placing the appeal on an Energy Commission Business Meeting Agenda.

**B. Binding Arbitration by Mutual Agreement**

Should the Energy Commission's Dispute Resolution procedure above fail to resolve a contract dispute or grievance to the satisfaction of the Contractor, the Contractor and Energy Commission mutually may elect to have the dispute or grievance resolved through binding arbitration. If one party does not agree, the matter shall not be submitted to arbitration.

The arbitration proceeding shall take place in Sacramento County, California, and shall be governed by the commercial arbitration rules of the American Arbitration Association (AAA) in effect on the date the arbitration is initiated. The

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dispute or grievance shall be resolved by one (1) arbitrator who is an expert in the particular field of the dispute or grievance. The arbitrator shall be selected in accordance with the aforementioned commercial arbitration rules.

If arbitration is mutually decided by the parties, arbitration is in lieu of any court action and the decision rendered by the arbitrator shall be final (not appealable to a court through the civil process). However, judgment may be entered upon the arbitrator's decision and is enforceable in accordance with the applicable law in any court having jurisdiction over this Agreement. The demand for arbitration shall be made no later six (6) months after the date of the contract's termination, despite when the dispute or grievance arose, and despite the applicable statute of limitations for a suit based on the dispute or grievance. If the parties do not mutually agree to arbitration, the parties agree that the sole forum to resolve a dispute is state court.

The cost of arbitration shall be borne by the parties as follows:

- 1) The AAA's administrative fees shall be borne equally by the parties;
- 2) The expense of a stenographer shall be borne by the party requesting a stenographic record;
- 3) Witness expenses for either side shall be paid by the party producing the witness;
- 4) Each party shall bear the cost of its own travel expenses;
- 5) All other expenses shall be borne equally by the parties, unless the arbitrator apportions or assesses the expenses otherwise as part of his or her award.

At the option of the parties, any or all of these arbitration costs may be deducted from any balance of funds from this Agreement. Both parties must agree, in writing, to utilize funds from this Agreement to pay for arbitration costs.

### 13. **TERMINATION**

The parties agree that because the Energy Commission is a state entity, it must be able to immediately terminate the Agreement upon the default of Contractors, and to proceed with the work required under the Agreement in any manner the Energy Commission deems proper. The Contractor specifically acknowledges that the Energy Commission's unilateral termination of the Agreement under the terms set forth below is an essential term of the Agreement, without which the Energy Commission would not enter into the Agreement. The Contractor further agrees that upon any of the events triggering the unilateral termination the Agreement by the Energy Commission, the Energy Commission has the sole right to terminate the Agreement, and it would constitute bad

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faith of the Contractor to interfere with the immediate termination of the Agreement by the Energy Commission.

This Agreement may be terminated for any reason set forth below.

### A. With Cause

In the event of any breach by the Contractor of the conditions set forth in this Agreement, the Energy Commission may, without prejudice to any of its legal remedies, terminate this Agreement for cause upon five (5) days written notice to the Contractor. In such event, the Energy Commission shall pay the Contractor only the reasonable value of the services rendered by the Contractor prior to termination, as may be agreed upon by the parties or determined by a court of law, but not in excess of the contract maximum payable. "Cause" includes without limitation:

- 1) Failure to perform or breach of any of the terms or covenants at the time and in the manner provided in this Agreement;
- 2) Inability of the Contractor to pay its debts as they become due and/or the Contractor's default of an obligation that impacts its ability to perform under this Agreement;
- 3) Determination by the Energy Commission or the Executive Director after notice and hearing that the Contractor or any agent or representative of the Contractor offered or gave gratuities to any officer or employee of the Energy Commission, with a view toward securing an Agreement or securing favorable treatment with respect to awarding, amending or making a determination with respect to performance of the Agreement;
- 4) Significant change in Energy Commission policy such that the work or product being funded would not be supported by the Energy Commission;
- 5) Reorganization to a business entity unsatisfactory to the Energy Commission; and
- 6) The retention or hiring of subcontractors, or the replacement or addition of personnel, that fail to perform to the standards and requirements of this Agreement.

### B. Without Cause

The Energy Commission may, at its option, terminate this Agreement without cause in whole or in part, upon giving thirty (30) days advance notice in writing to the Contractor. In such event, the Contractor agrees to use all reasonable efforts to mitigate its expenses and obligations hereunder. Also, in such event, the

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Energy Commission shall pay the Contractor for all satisfactory services rendered and expenses incurred within thirty (30) days after notice of termination which could not by reasonable efforts of the Contractor have been avoided, but not in excess of the maximum payable under this Agreement.

### 14. **ENFORCEABILITY**

The Contractor agrees that if it or one of its subcontractors fails to comply with all applicable Federal and State requirements governing the use of ARRA funds, the State may withhold or suspend, in whole or in part, funds awarded under the program, or recover misspent funds following an audit. This provision is in addition to all other remedies available to the State under all applicable Federal and State laws.

### 15. **WAIVER**

No waiver of any breach of this Agreement shall be held to be a waiver of any other or subsequent breach. All remedies afforded in this Agreement shall be taken and construed as cumulative, meaning in addition to every other remedy provided therein or by law. The failure of the Energy Commission to enforce at any time any of the provisions of this Agreement, or to require at any time performance by the Contractor of any of the provisions, shall in no way be construed to be a waiver of those provisions, nor in any way affect the validity of this Agreement or any part of it or the right of the Energy Commission to thereafter enforce each and every such provision.

### 16. **CAPTIONS**

The clause headings appearing in this Agreement have been inserted for the purpose of convenience and ready reference and do not define, limit, or extend the scope or intent of the clauses.

### 17. **PRIOR DEALINGS, CUSTOM OR TRADE USAGE**

In no event shall any prior course of dealing, custom or trade usage modify, alter, or supplement any of these terms.

### 18. **NOTICE**

This section applies to situations where notice is required to be given by this Agreement, or the parties are asserting their legal rights and remedies. This section is not intended to apply to normal, daily communication between the parties related to progress of the work.

The parties to the Agreement must give legal notice using U.S. Mail, overnight mail, or personal delivery, providing evidence of receipt to the person identified in Exhibit F of this Agreement for legal notices. Delivery by fax or e-mail is not considered legal notice for the purpose of this section.

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Notice shall be effective when received, unless a legal holiday for the State commences on the date of the attempted delivery. In this event, the effective date shall be postponed until the next business day.

### 19. **STOP WORK**

The Contract Officer may, at any time, by written notice to the Contractor, require the Contractor to stop all or any part of the work tasks in this Agreement. Stop Work Orders may be issued for reasons such as a project exceeding budget, standard of performance, out of scope work, delay in project schedule, and misrepresentations.

- A. Compliance. Upon receipt of such stop work order, the Contractor shall immediately take all necessary steps to comply therewith and to minimize the incurrence of costs allocable to work stopped.
- B. Equitable Adjustment. The Commission shall make an equitable adjustment based upon the Contractor's written request. The Contractor must make such adjustment request within thirty (30) days from the date of receipt of the stop work notice.
- C. Revoking a Stop Work Order. The Contractor shall resume the stopped work only upon receipt of written instructions from the Energy Commission's Contract Officer canceling the stop work order.

### 20. **INTERPRETATION OF TERMS**

This Agreement shall be conducted in accordance with these terms and conditions. The Contractor's proposal is not attached, but is expressly incorporated by reference into this Agreement. In the event of conflict or inconsistency between the terms of this Agreement and the solicitation or proposal, this Agreement shall be considered controlling.

### 21. **AMENDMENTS**

- A. This Agreement may be amended to make changes, including without limitation: additional funds, additional time, additional or modified tasks, and additional or modified terms. Amendments may be made without competitively bidding, so long as the amendment is exempt from competitive bidding pursuant to California Public Contract Code Section 10335, California Government Code Section 11010.5, and the State Contract Manual. Amendments may require prior written approval from DOE.

## ATTACHMENT 6

- B. The Contractor acknowledges that provisions included in this Agreement pursuant to Federal or State law, regulation, or policy are subject to change. The Contractor agrees to comply with any amendments that the Energy Commission makes to this Agreement to comply with Federal or State law, regulation, or policy.

C. Formal Amendments

Significant changes to this Agreement must be approved at an Energy Commission business meeting through a formal amendment. Significant changes include, but are not limited to:

- 1) Change of the Contractor;
- 2) Changes to Exhibit A that significantly modify the Agreement's purpose;
- 3) Changes to Exhibit A that extend the due dates beyond the term of the Agreement;
- 4) Changes to Exhibit B that increase the amount of the Agreement; and
- 5) Changes to Exhibit B that increase rates or fees.

D. Informal Amendments

The Energy Commission's Contract Manager may approve changes to this Agreement that are not significant, including changes required to comply with Federal or State law, regulation, or policy. These changes shall be documented in a letter of agreement between the Energy Commission's Contracts Officer and the Contractor.

## 22. **INSURANCE REQUIREMENTS**

- A. The requirements below specify the Contractor's insurance obligations under this Agreement. Prior to the Contractor commencing performance of services and for the duration of this Agreement, the Contractor shall, at its sole cost and expense, carry and maintain employer's liability insurance, comprehensive general liability insurance, professional liability insurance and automobile liability insurance (including coverage for owned, non-owned and hired autos) on a "per claim" basis. Such insurance shall conform to the following requirements:

- 1) Workers' Compensation. Statutory Workers' Compensation covering all employees and complying with all laws of California, and Employer's Liability Insurance with minimum limit of One Million Dollars (\$1,000,000).
- 2) Commercial General Liability. Commercial General Liability providing for a limit of not less than One Million Dollars (\$1,000,000) per claim and Two

## ATTACHMENT 6

Million Dollars (\$2,000,000) aggregate for bodily injury or property damage combined.

- 3) Professional Liability. Professional Liability insurance including coverage for any errors or omissions caused by negligence in the performance of duties under this Agreement, providing for a limit of not less than One Million Dollars (\$1,000,000) per claim and Three Million Dollars (\$3,000,000) aggregate.
  - 4) Automobile Liability. Commercial Automobile Liability insurance coverage in the sum of not less than One Million Dollars (\$1,000,000) per accident for bodily injury and property damage, including coverage for owned, non-owned, and hired automobiles.
- B. The Contractor shall supply the Energy Commission with certificates evidencing such insurance, which shall show the Energy Commission and the State of California (and any other party identified as an Indemnified party) as additional insured parties under the comprehensive general liability insurance and automobile insurance policies with respect to the Contractor's Services and shall provide for thirty (30) days' written notice to Energy Commission prior to cancellation or modification of any certificate of insurance required under this contract. Cancellation or modification shall be consistent with the insurance requirements of this exhibit. Certificates evidencing the required insurance as stipulated shall be presented prior to any payments made pursuant to this Agreement.

### 23. **CONFIDENTIALITY**

A. Information Considered Confidential

If applicable, all Contractor information considered confidential at the commencement of this Agreement is designated in the Attachment to this Exhibit.

B. Confidential Deliverables: Labeling and Submitting Confidential Information

Prior to the commencement of this Agreement, if applicable, the parties have identified in the Attachment to this Exhibit, specific Confidential Information to be provided as a deliverable. All such confidential deliverables shall be marked, by the Contractor, as "Confidential" on each page of the document containing the Confidential Information and presented in a sealed package to the Commission's Contracts Officer. (Non-confidential deliverables are submitted to the Accounting Office.) All Confidential Information will be contained in the "confidential" volume: no Confidential Information will be in the "public" volume.

C. Submittal of Unanticipated Confidential Information as a Deliverable



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The Contractor and the Energy Commission agree that during this Agreement, it is possible that the Contractor may develop additional data or information not originally anticipated as a confidential deliverable. In this case, the Contractor shall follow the procedures for a request for designation of Confidential Information specified in 20 California Code of Regulations (CCR) Section 2505. The Energy Commission's Executive Director makes the determination of confidentiality. Such subsequent determinations may be added to the list of confidential deliverables in the Attachment to this Exhibit.

### D. Disclosure of Confidential Information

Disclosure of Confidential Information by the Energy Commission may only be made pursuant to 20 CCR Sections 2506 and 2507. All confidential data, records or deliverables that are legally disclosed by the Contractor or any other entity become public records and are no longer subject to the above confidentiality designation.

## 24. **CONFLICT OF INTEREST**

- A. The Contractor agrees to continuously review new and upcoming projects in which members of the Contractor's team may be involved for potential conflicts of interest. The Contractor shall inform the Contract Manager as soon as a question arises about whether a potential conflict may exist. The Contract Manager and Energy Commission's Chief Counsel's Office shall determine what constitutes a potential conflict of interest. The Energy Commission reserves the right to redirect work and funding on a project if the Commission's Chief Counsel's Office determines that there is a potential conflict of interest.
- B. The Contractor shall submit an economic interest statement (Fair Political Practices Commission's Form 700) from each employee or subcontractor whom the Energy Commission's Chief Counsel's Office, in consultation with the Contract Manager, determines is a consultant under the Political Reform Act and, thus, subject to the requirements and restrictions of the Act. Such determination will be based on the nature and duration of the work to be performed by the employee or subcontractor. The determination as to who is a consultant under the Political Reform Act shall be requested by the Contract Manager before work by the employee or subcontractor begins. Each employee and subcontractor determined to be a consultant under the Political Reform Act shall be subject to the same disclosure category or categories applicable to the Commission staff who perform the same nature and scope of work as the consultant.
- C. No person, firm, or subsidiary thereof who has been awarded a consulting services contract may submit a bid for, nor be awarded a contract for, the provision of services, procurement of goods or supplies, or any other related action which is required, suggested, or otherwise deemed appropriate in the end product of the consulting services contract. This does not apply to any person, firm, or subsidiary

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thereof who is awarded a subcontract of a consulting services contract which amounts to no more than ten (10) percent of the total monetary value of the consulting services contract.

### 25. **RECOGNITION OF ARRA FUNDING**

The Contractor shall publicly recognize ARRA as a source of funding for project(s) funded under this Agreement. The Contract Manager shall provide the Contractor with instructions on how to publicly recognize ARRA funding.

### 26. **STATE ARRA IDENTITY MARK AND LOGO**

It is important for all ARRA-funded programs administered by the Energy Commission to provide consistent and clear messaging and branding for the State of California's consumers. A single identifying brand lends authority and reliability to the multiple statewide programs offered by various private and public local, regional, and state entities. The Energy Commission is implementing a statewide branding effort for this purpose. The branding effort will include development of a statewide ARRA Program Identity Mark and Logo (Identity Mark/Logo) for use in conjunction with marketing, promotional, and educational materials, and development of one or more central website portals for purposes of disseminating program information and interconnecting program participants. The Energy Commission's statewide branding effort is being developed in conjunction with the statewide branding efforts of the California Public Utilities Commission and the individual branding efforts of various program participants.

The Contractor shall participate in the Energy Commission's statewide branding effort as specified in this section.

#### A. Identity Mark/Logo

The Contractor shall use the Identity Mark/Logo on all marketing, promotional, and informational materials for programs and projects funded through this Agreement, including any printed or electronic collateral, websites, signage, or clothing.

#### B. Coordinating Use of Identity Mark/Logo

- 1) The Contractor shall coordinate its required use of the Identity Mark/Logo with the Energy Commission before using the Identity Mark/Logo. This coordination may include the Contractor's submission of its proposed marketing, promotional, and information materials and websites to the Energy Commission for its review to ensure the Identity Mark/Logo is being used appropriately. If the Energy Commission requires the Contractor to submit such materials and websites for its review, the Energy Commission will use its best efforts to approve all proposed uses of the Identity Mark/Logo in an expeditious manner. The Energy

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Commission may prohibit the Contractor from using the Identity Mark/Logo if any of the proposed uses breach the terms of this Agreement.

- 2) Upon reasonable prior written notice, the Contractor shall provide the Energy Commission unrestricted access to its websites, so the Energy Commission may review the Contractor's use of the Identity Mark/Logo.

### C. Authorized Uses

- 1) The Contractor may use, reproduce, display, and publish the Identity Mark/Logo only for purposes of marketing or promoting the ARRA-funded program or project(s) funded through this Agreement. The Contractor may not use the Identity Mark/Logo for other purposes. The Contractor may not use any other Energy Commission mark or logo obtained from the Energy Commission's website, promotional materials, or any other source.
- 2) The Contractor may use, reproduce, and display the Identity Mark/Logo on its website as a link to the Energy Commission's website. The Contractor may not use the Identity Mark/Logo to link to any other website.

### D. Unauthorized Uses

- 1) The Contractor may not use the Identity Mark/Logo in a manner that expresses or implies the Energy Commission's endorsement, approval, favoring, or sponsorship of the Contractor or its products, services, or websites. Except to identify itself as a contractor of the Energy Commission, the Contractor may not use the Identity Mark/Logo in a manner that implies the Energy Commission's affiliation with the Contractor or its products, services, or websites.
- 2) The Contractor may not use the Identity Mark/Logo in a manner that suggests the Contractor's products, services, or websites are the Energy Commission's products, services, or websites.
- 3) The Contractor may not use the Identity Mark/Logo in a manner that damages, disparages, or diminishes the Energy Commission or its ARRA-funded programs or projects, including but not limited to uses that could be deemed obscene or that encourage unlawful activities.
- 4) The Contractor may not authorize any other party to use the Identity Mark/Logo.
- 5) The Contractor may not use the Identity Mark/Logo as a feature or design element of any other logo. The Contractor may not use the Identity Mark/Logo in any trademark, service mark, service name, or other indicia of origin.

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- 6) The Contractor may not alter the Identity Mark/Logo in any manner, including proportions, colors, or elements, except as otherwise permitted by the Energy Commission.
- 7) The Contractor may not use the Identity Mark/Logo on any materials in which the Contractor's name, logo, or product name does not also appear.

### E. Ownership of Identity Mark/Logo

- 1) As between the Energy Commission and the Contractor, the Energy Commission is the exclusive owner of the Identity Mark/Logo. The Energy Commission retains all rights and title to, and interest in, the Identity Mark/Logo. This Agreement does not transfer to the Contractor the Energy Commission's service marks, copyrights, or other intellectual property interests.
- 2) The Contractor may not register, adopt, or use any corporate name, trade name, trademark, domain name, service mark, certification mark, or other designation that violates the Energy Commission's rights in the Identity Mark/Logo.

## 27. SURVIVAL

Certain Agreement provisions shall survive the completion or termination of this Agreement for any reason. The provisions include, but are not limited to, the following:

A. Recordkeeping and Inspection of Records (Exhibit D)

B. Purchase of Equipment (Exhibit D)

C. Intellectual Property Rights of Parties (Exhibits D and E)

D. Disputes (Exhibit D)

E. Confidentiality (Exhibit D)

F. Indemnification (incorporated by reference in Exhibit C; applicable only to Contractors other than state agencies)